# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-1488

VINCENT PACELLI, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals is reported at 491 F. 2d 1108.

### JURISDICTION

The judgment of the court of appeals was entered on January 11, 1974. Mr. Justice Marshall extended the time for the filing of a petition for a writ of certiorari until April 7, 1974; the petition was filed on April 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether 18 U.S.C. 241 protects the right to testify in federal court without violent interference.

2. Whether there was sufficient evidence to support the jury's verdict that the defendant was guilty of conspiring to interfere with the rights of a prospective federal court witness.

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to injure a citizen in the free exercise of a right secured to her by the Constitution, in violation of 18 U.S.C. 241, by conspiring with Barry Lipsky to murder Patsy Parks to prevent her from testifying in a federal court. He was sentenced to life imprisonment.[1] The court of appeals reversed and remanded for a new trial, holding that prejudicial hearsay evidence had been admitted, and that the Jencks Act, 18 U.S.C. 3500, required the government to show defendant a letter written by Lipsky (Pet. App. 1359-1369). The court rejected petitioner's contention that the conduct with which he was charged was not a violation of 18 U.S.C. 241; petitioner here seeks review of that determination.

The evidence at trial showed that Patsy Parks had testified before a federal grand jury which indicted petitioner for violations of the federal narcotics laws. When she learned that federal agents had tried to serve her with a subpoena ordering her to appear as a witness at petitioner's trial, she told Lipsky that she wanted to see petitioner about the subpoena. Lipsky transmitted the message to petitioner, and went with him to meet her. They stopped on the way to purchase four gallons of gasoline, which petitioner stated was "to burn up the

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[1]Petitioner was also convicted on a second count of obstruction of justice in violation of 18 U.S.C. 1503, and sentenced to a concurrent five-year term of imprisonment for that offense.

girl's body" (Pet. App. 1350). While petitioner and Lipsky were driving their victim to a deserted part of Long Island, petitioner offered her money to leave the State, but she refused. Petitioner then killed her by stabbing her repeatedly, and he and Lipsky dumped her body in a wooded area, poured the gasoline on it, and burned it (Pet. App. 1350-1351).

**ARGUMENT**

1. Petitioner suggests that Patsy Parks had no right to be a witness in a federal case, and if she did, it is not the type of right protected by 18 U.S.C. 241.

This Court held in *In re Quarles,* 158 U.S. 532, that the predecessor of Section 241 applied to a conspiracy to injure a citizen for reporting violations of internal revenue laws to a Deputy United States Marshal. The Court noted that it is "the duty and the right * * * of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. * * * The right of a citizen informing of a violation of law * * * to be protected against lawless violence * * * arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action." 158 U.S. at 535-536.

Petitioner attempts to distinguish the right to testify at trial from the right protected in *Quarles* on the ground that a potential witness cannot compel the taking of his testimony. But the right involved here is the right to testify, whether willingly or under the compulsion of a subpoena, without interference. As in *Quarles,* the question whether a citizen may compel a federal official to accept

his testimony is irrelevant; what is at issue is his right to be free of harassment when he does testify. 158 U.S. at 536.[2]

Section 241 is a more effective tool for the protection of federal rights than petitioner suggests. Indeed, "from original enactment [as part of the Enforcement Act of 1870] through subsequent codifications, [it] was intended to deal * * * with conspiracies to interfere with 'Federal rights and with all Federal rights'. * * * We cannot doubt that the purpose and effect of § 241 was to reach assaults upon rights under the entire Constitution * * * and not merely under part of it." *United States* v. *Price*, 383 U.S. 787, 803, 805. The rights protected are not only those expressly enumerated in the Constitution, but also those implied rights which are essential to the operation of government. *Ex parte Yarbrough*, 110 U.S. 651; *In re Quarles*, 158 U.S. 532; *Logan* v. *United States*, 144 U.S. 263; *Motes* v. *United States*, 178 U.S. 458; *Brewer* v. *Hoxie School District No. 46*, 238 F. 2d 91 (C.A. 8).[3]

One of the rights essential to the functioning of the national government is the right of a citizen to communicate safely to the government any information which he has concerning an offense against the laws of the United States. *In re Quarles, supra; Motes* v. *United States, supra.* The fact that the information is communicated by

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[2]Petitioner's suggestion that 18 U.S.C. 241 would not apply if Patsy Parks did not wish to testify (Pet. 18) is likewise incorrect. *Quarles* indicates that the Section applies to rights which are in the nature of duties. There is no reason why the right to federal protection should depend on whether testimony is voluntarily or involuntarily given.

[3]Contra, *United States* v. *Sanges*, 48 Fed. 78 (C.A.5) on which petitioner relies. See n. 4, *infra*.

testimony at trial, rather than (as in *Quarles*) by reporting violations of the law to enforcement officials is not material; Section 241 applies equally in either case. *Foss* v. *United States,* 266 Fed. 881 (C.A. 9). Thus the court of appeals correctly held that the federal government "has a particular interest in assuring a prospective witness that he or she will be free to respond by attending the trial of a federal indictment as a witness without being prevented from doing so by threats, molestation or force" (Pet. App. 1355).

2. The enactment of 18 U.S.C. 245 in 1968 was not intended to narrow the scope of Section 241. As the court of appeals correctly concluded (Pet. App. 1358; citations omitted):

> Neither the language nor the legislative history of the new statute indicates the slightest intention to strip the national government of its existing ability under § 241 to protect such important interests as the right to remain in the official custody of a United States Marshal, to inform on violations of federal law, to testify at proceedings held under authority of federal law, to travel interstate to arrive at the seat of government, [and] to assemble and petition the Congress for a redress of grievances.

In enacting Section 245, Congress expressed its intent concerning Section 241 by amending it only to alter the penalty provisions (P.L. 90-284, Title I, § 103, 82 Stat. 75). It would in these circumstances be particularly inappropriate to conclude that the enactment of Section 245, dealing primarily with racial violence, was intended to further amend Section 241 by implication and to narrow its scope solely to those offenses identified in Section 245.

3. Finally, petitioner contends that there was insufficient evidence to establish that he conspired to violate 18 U.S.C. 241. The testimony of Barry Lipsky, however, amply established all of the elements required by the statute under which petitioner was convicted. Lipsky himself told petitioner that Patsy Parks had been subpoenaed to testify in federal court. Petitioner immediately responded: "I know what I have to do" (Pet. App. 1350). Lipsky and petitioner, together, then made the preparations for the murder and the concealment of the crime. Thus, there was ample evidence from which the jury could conclude, if Lipsky were believed, that there was an agreement between the two conspirators to murder Patsy Parks for the purpose of preventing her appearance pursuant to federal command.[4]

Moreover, petitioner does not complain that the jury was improperly instructed on the applicable law, and in such cases it is not the function of this Court to assess the weight of the evidence. *Glasser* v. *United States,* 315 U.S. 60, 80.

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[4]Petitioner contends that there was insufficient evidence to prove that he knew that Patsy Parks had a right to testify in federal court without harassment (Pet. 19). "In determining whether [the requisite] specific intent existed, the jury * * * need not, in order to convict, determine that [the conspirators] actually knew that it was a Constitutional right that they were violating or conspiring against." *United States* v. *O'Dell,* 462 F. 2d 224, 232, n. 10 (C.A. 6); see *Screws* v. *United States,* 325 U.S. 91, 106.

Petitioner further suggests that *Screws, supra,* requires reversal here because the right involved has not "been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." 325 U.S. at 104. But *Foss, Quarles,* and *Logan, supra,* all show that the right to present evidence concerning violations of federal law without harassment is a protected right. To the extent that *United States* v. *Sanges,* 48 Fed. 78 (C.A. 5), indicates otherwise, it has been overruled by *Quarles.*

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

J. STANLEY POTTINGER,
*Assistant Attorney General.*

HARRIET S. SHAPIRO,
*Assistant to the Solicitor General.*

FRANK D. ALLEN, JR.,
PAUL S. LAWRENCE,
*Attorneys.*

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